No. 82-2077

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah Corporation,

Petitioners,

vs.

PROGRESSIVE MUSIC SUPPLY, INC., NORLIN MUSIC, INC., formerly CHICAGO MUSICAL INSTRUMENTS, and PEAVEY ELECTRONICS CORPORATION,

Respondents.

BRIEF OF RESPONDENT PEAVEY ELECTRONICS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN SUPPORT OF MOTION OF RESPONDENT PEAVEY ELECTRONICS CORPORATION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

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QUESTIONS PRESENTED

The questions presented below reflect the issues arising with respect to respondent Peavey Electronics Corporation. The issues raised by petitioners with respect to all other parties are separate and distinct from those alleged against Peavey Electronics Corporation, and are not addressed by this brief.

I. Whether the petition for writ of certiorari fails to comply with Supreme Court Rule 17.1 by failing to state any special and important reasons for review of this action by the Court.

II. Whether the petition for writ of certiorari actually, in good faith, states a perceived conflict among the Circuits, or whether Petitioner has frivolously contrived a "conflict" by misreading his own cited precedent and ignoring the findings of the trial judge.

III. Whether the petition for writ of certiorari actually, in good faith, states a perceived departure from the accepted and usual course of judicial proceedings in the trial and appeal process by the lower courts, or whether petitioner has frivolously made such allegations to this Court.

IV. Whether the instant petition for writ of certiorari is frivolous as defined by Supreme Court Rule 49.2, and, if so, whether respondent is entitled to damages.

DESIGNATION OF CORPORATE RELATIONSHIPS

Peavey Electronics Corporation was incorporated under this name, it is not owned by any other corporation, does not have an ownership interest in any subsidiaries, and does not have any affiliates.

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OPINIONS AND JUDGMENTS BELOW

The trial judge's Order Granting in Part Defendants' Motion to Dismiss Under Rule 41(b) is reproduced in Appendix A. The opinion of the United States District Court for the District of Utah is reported at 1982-2 Trade Cas. ¶64,928 (D. Utah 1981) and is reproduced in Appendix B to the Petition for Writ of Certiorari. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 703 F.2d 432 (10th Cir. 1983) and is reproduced in Appendix A to the Petition for Writ of Certiorari.

STATUTES AND RULES RELEVANT TO BRIEF IN OPPOSITION AND MOTION FOR DAMAGES

The pertinent statutes, Federal Rules of Civil Procedure, and Supreme Court Rules raised by Peavey Electronics Corporation's Brief in Opposition and Motion for Damages are listed below; they are reproduced in their entirety in Appendix B:

Statutes:

1. Sherman Antitrust Act §1, 15 U.S.C. § 1

Federal Rules of Civil Procedure:

1. Fed. R. Civ. P. 41(b)
2. Fed. R. Civ. P. 52(a)

Supreme Court Rules:

1. Sup. Ct. R. 17.1
2. Sup. Ct. R. 49.2

STATEMENT OF THE CASE

A. Procedural Overview

Clair Olsen and Guitar City Studios, Inc. (hereinafter collectively referred to as "Olsen"), petitioners herein, filed this antitrust action in 1975 against Progressive Music Supply, Inc. (hereinafter referred to as "Progressive"), a competing Utah retailer of musical instruments and audio equipment. Also named as defendants were several manufacturers of musical instruments and audio equipment including this respondent, Peavey Electronics Corporation (hereinafter referred to as "Peavey"). Thereafter, four years of extensive discovery ensued, and Olsen presented his case for 27 total trial days in a trial to the court. Olsen closed his case on June 12, 1979. Peavey filed a motion for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b). After extended and careful scrutiny of the evidence and inferences adduced at trial, and additional extensive briefing by the parties, all claims against Peavey were dismissed on May 22, 1980. *See* App. A. The trial court found that Olsen had failed to meet his burden of proof or to establish a case that Peavey violated any of the antitrust laws.[1]

[1] After the Rule 41(b) dismissal of Peavey, and certain other manufacturers, Olsen's only remaining claim was that Progressive violated §1 of the Sherman Act in its dealings with two nondefendants, CBS Musical Instruments (hereinafter referred to as "CBS Musical") and Mrs. Bobbie Herger (hereinafter referred to as "Herger"), a CBS Musical retail dealer in Provo, Utah. The allegations against CBS Musical and Herger are unrelated to those against Peavey. Trial of these matters resulted in findings that Progressive, along with Herger and CBS Musical, were involved in a boycott to prevent Olsen from receiving instruments from CBS Musical. Actual damages awarded were $4,303.00. The trial court also found that Progressive and Herger conspired to fix the resale prices on CBS Musical products sold to consumers at the retail stores; however, the court found no damages attributable to this conduct. *Olsen v. Progressive Music Supply, Inc.*, 1982-2 Trade Cas. ¶ 64,928 (D. Utah 1981).

The United States Court of Appeals for the Tenth Circuit reviewed the extensive record under the "clearly erroneous" test of Fed. R. Civ. P. 41(b), 52(a). Without significant discussion, the Tenth Circuit concluded that the trial court's rulings on the issues pertinent to Peavey were correct, and affirmed the district court's dismissal of all claims against Peavey. The Court also affirmed in all other respects the rulings of the trial court as to the other defendants. *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432 (10th Cir. 1983).

B. Factual Overview

Olsen prematurely discusses the facts of the case, as he perceives them, rather than the reasons this Court should grant review. Therefore, the following factual overview is offered in rebuttal.

Olsen's initial difficulties arose from facts unrelated to Peavey. Olsen was a full-time employee of the federal government working at Hill Air Force Base until April 1974. On a part-time basis, beginning in 1964, Olsen operated a small, sole proprietorship, selling musical instruments, amplifiers, public address systems, and accessories in Kaysville, Utah. Olsen alleged he had difficulties obtaining instruments from various manufacturers beginning in 1971. Thus, the time frame that is relevant for consideration of Olsen's claims extends from April 1971 to March 1975.

Olsen acquired distributorships for two additional lines of audio equipment, Farfissa and Acoustic, in 1974 after settling disputes with a former business partner; these acquisitions prompted him to relocate in a larger store in Kaysville and to begin selling on a full-time basis. (TT., Vol. V, pp. 1350-51, 1354).[2] By devoting his full attention to the musical instrument business, with double his previous floor space, and by adding a repair service, Olsen's sales rose from approximately 7% of the

[2] The Trial Transcript is cited as "TT". A Supplemental Trial Transcript is cited as "Supp. TT".

volume sold by Progressive to a dramatic 70% of Progressive's volume. *See Olsen v. Progressive,* 703 F.2d at 435. Olsen formed a new corporation, Guitar City Studios, Inc., in February 1975, before filing his original complaint in April 1975.

Progressive Music Supply, Inc., is a Utah corporation engaged in the retail sale of musical instruments, amplifiers, public address systems, accessories, and related items. Progressive is an authorized dealer of numerous lines of products including, since the early 1970's, Peavey products, in Ogden, Provo, and Salt Lake City.

Peavey, a Delaware corporation with its principal place of business in Mississippi, began to manufacture audio equipment, speakers and amplifiers in the early 1970's. As a new entrant in the market for manufacturing audio equipment, Peavey initially was unable to compete with established manufacturers, like CBS Musical and several others, who possessed substantial name recognition and goodwill among purchasers. (TT., Vol. I, pp. 28-9). Peavey also was fettered by its limited manufacturing facilities.

Peavey was practically unknown when it entered the Utah market. To facilitate its market penetration, Peavey established Progressive, then one of the largest dealers in Utah, as its exclusive dealer within a 250-mile radius of Progressive's three store locations. Olsen unjustifiably reads an evil motive into Peavey's business judgment. As the district court found below, Olsen's business was a small, part-time operation. It was without any facilities to provide repair or warranty service at the time Peavey granted an exclusive dealership to Progressive. Significantly, the trial court found that Peavey exercised reasonable business judgment in establishing an exclusive dealership with Progressive to maximize the impact of Peavey's entry into the Utah market in the early 1970's. *See* App. A at 9a-11a.

Peavey's high quality, moderately-priced products gained market acceptance more rapidly than Peavey could expand its

production. (TT. Vol. III, pp. 657-59; Vol. VII, pp. 735-36). Naturally, in such circumstances, Peavey products were attractive to individual dealers because their customers were willing to pay higher prices to obtain Peavey products. (Supp. TT., Vol. I, pp. 59-62). Olsen incorrectly claims Peavey aided Progressive in fixing these higher prices. However, Olsen failed to show at trial that Peavey even was aware of Progressive's pricing policies, *(See* TT., Vol. V., p. 1303), and the trial court found that Progressive priced independently of Peavey, *see* App. A at 8a-9a.

Olsen also claims that Peavey conspired with Progressive and three of the other manufacturer-defendants to boycott Olsen and to monopolize the Utah market. In connection with Olsen's alleged boycott and monopoly claims the lower court could find "no credible evidence that Progressive and Peavey or anyone else conspired to create a monopoly on behalf of Progressive, or entered into any other illegal or anticompetitive agreement to boycott [Olsen] with respect to Peavey products." App. A at 8a-9a. In regard to the alleged conspiracies between Peavey and other manufacturers, the court specifically found absolutely "*no evidence* of agreement or conspiracy between [another manufacturer] and Peavey horizontally at the manufacturer level and Progressive at the retail level to boycott [Olsen] and create a monopoly in favor of Progressive." *Id.* at 11a (emphasis added). Given that Olsen failed to introduce any evidence whatsoever linking Peavey to another manufacturer, the court could make no other findings.

SUMMARY OF ARGUMENT

This case is inappropriate for review on writ of certiorari. No "special and important" reasons for granting review arise in this case, and none are stated in petitioner's brief. There is no conflict between the opinion of the Tenth Circuit in this case and the decisions of other circuits or of this Court. Both the

district court and the Tenth Circuit applied the correct standards of judgment and review and neither court, as Olsen suggests, departed from the accepted and usual course of judicial proceedings in deciding this controversy. Olsen's petition merely challenges the lower courts' finding that his factual evidence was insubstantial.

Peavey's dismissal pursuant to Fed. R. Civ. P. 41(b) created no conflict among the Circuits because Olsen failed to produce any evidence of Peavey's participation in either a group boycott or any conspiracy in restraint of trade. Olsen offered no proof of a relevant market. Olsen's allegations and claims cannot be substituted for the trial court's findings. The Supreme Court does not sit as a trier of fact, as Olsen apparently desires.

The district court correctly weighed the evidence as the trier of fact pursuant to Fed. R. Civ. P. 41(b). The Tenth Circuit then correctly applied the "clearly erroneous" test as required by Fed. R. Civ. P. 52(a) in its review of the trial court's findings.

Olsen's petition is frivolous as it seeks merely a *de novo* review of the inferences and conclusions of the trial judge. Olsen's contrived effort to create an inter-circuit conflict through the misstatement of the facts and the governing law entitles Peavey to recover the costs it unjustly incurred in responding to Olsen's petition.

ARGUMENT

I. OLSEN FAILS TO SATISFY THE STANDARDS GOVERNING REVIEW ON CERTIORARI CONTAINED IN RULE 17 OF THE SUPREME COURT RULES.

This is not an appropriate case for review by this Court. Review on writ of certiorari is a matter of this Court's discretion, "and will be granted only when there are special and important reasons therefor," Sup. Ct. R. 17.1. Olsen's petition is frivolous because the issues it raises with respect to Peavey do not even arguably meet the standards set forth in Supreme Court Rule 17.

Rule 17.1(a) indicates that certiorari may be granted "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals . . . ." The trial judge's refusal to find the facts as Olsen would have found them does not mean that the opinion in this case is in conflict with decisions of other circuits. Although Olsen alleges the "proof" of certain facts, his argument merely goes to the weight of the evidence.

Olsen makes three claims against Peavey: (1) Olsen alleges he "proved" a group boycott under *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), Brief for Petitioner at 8, based upon the "clear weight of the evidence," Brief for Petitioner at 10; (2) Olsen alleges he "proved that the refusals to deal [with Olsen] by Peavey [in order] to grant Progressive an exclusive dealing [sic], had an anticompetitive effect in the market . . .," *id.* at 8; and (3) Olsen alleges that "the court's dismissal of . . . Peavey dismembered the conspiracy contrary to . . . *Continental Ore* [*Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)]" *id.* at 8. As will be shown below, the sufficiency of Olsen's "proof" does not raise a conflict among the circuits.

Rule 17.1(a) also indicates review may be granted where a federal court of appeals "has so far departed from the accepted

and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." The district court did not depart from accepted judicial proceedings by granting Peavey's motion for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b). The Tenth Circuit did not sanction any such departure by application of the "clearly erroneous" test of Fed. R. Civ. P. 52(a). This Court should not allow Olsen to raise again the issue of "special inferences" in his petition for certiorari, after being admonished by the Tenth Circuit that his view was "unfounded". *Olsen v. Progressive,* 703 F.2d at 436. Olsen's citation of *Continental Ore,* a case involving a directed verdict, as support for his "special inferences" argument, is misplaced. A different standard applies when, as in this case, the cause was tried to the court rather than to a jury.

In sum, Olsen was given a full and fair opportunity to present all his evidence against Peavey. The trial court's finding that his evidence was insubstantial does not constitute a departure from normal judicial procedure.

Finally, the order dismissing Peavey because of Olsen's insufficient evidence did not decide "an important [unsettled] question of federal law," or create a "conflict with applicable decisions of this Court," Sup. Ct. R. 17.1(c). Olsen has failed to show why this case should be heard by the Supreme Court.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS: OLSEN HAS ATTEMPTED TO MANUFACTURE A CONFLICT AMONG THE CIRCUITS BY MISREADING APPLICABLE PRECEDENT AND IGNORING THE FINDINGS OF THE TRIAL COURT.

A. There is no conflict with *Klor's:* Olsen failed to prove a group boycott.

Olsen confuses the allegations necessary to sustain a cause of action with the facts he must prove to entitle him to relief.

Olsen asserts that he was the victim of a group boycott in which Peavey participated, and that he is entitled to relief under *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Brief for Petitioner at 8. This Court should reject Olsen's erroneous reading of the holding of *Klor's*, as well as Olsen's conclusory and incorrect statement of the facts "proven" at the trial court.

The specific issue decided by *Klor's* was whether a complaint alleging a conspiracy among manufacturers, distributors, and a retailer to boycott Klor's stated a cause of action under section 1 of the Sherman Act, 15 U.S.C. § The Ninth Circuit had affirmed the trial court's grant of summary judgment against Klor's, holding that the required showing of a public injury was missing: "[A] violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 255 F.2d 214, 233 (9th Cir. 1958). The Supreme Court's reversal of the Ninth Circuit was a matter of statutory interpretation, the Court determining that "Klor's *allegations* clearly show one type of trade restraint and public harm the Sherman Act forbids," *Klor's*, 359 U.S. at 210 (emphasis added). Thus, Klor's "remedy" was the opportunity to go to trial to sustain its allegations.

Olsen already has been given the opportunity to prove his allegations of a group boycott at trial; however, Olsen utterly failed to substantiate those allegations. The district court was unable even to infer such a cause of action against Peavey from the facts introduced at trial. *See* App. A at 6a, 11a. There is no evidence that Peavey contemplated, discussed or took part in any communications with other audio equipment manufacturers, much less to conspire against Olsen. Moreover, Olsen failed to show an agreement of any kind to boycott him between Peavey and any other manufacturers, or any intent to do so. On review, the Tenth Circuit found that "[t]he district court drew permissible inferences based upon the record evi-

dence," *Olsen v. Progressive,* 703 F.2d at 436. The fact that both the district court and the Tenth Circuit found Olsen's evidence to be so insubstantial that judgment for Peavey under Fed. R. Civ. P. 41(b) was appropriate does not mean that Olsen was denied his cause of action under *Klor's. Klor's* was applied consistently by both courts below.

B. There is no conflict with *Com-Tel:* the findings of the district court make *Com-Tel* irrelevant.

In the midst of his group boycott argument, Olsen interjects the claim that he "proved" Peavey's exclusive dealing agreement with Progressive "was an exception to Peavey's normal distribution system," Brief for Petitioner at 10, entitling Olsen to relief under *Com-Tel, Inc. v. DuKane Corp.,* 669 F.2d 404 (6th Cir. 1982). Once again, Olsen misreads his own cited precedent and attempts to show a conflict among the circuits by misstating the facts found by the district court.

Olsen states that:

> [Com-Tel], based on *GTE Sylvania* [*Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977)]; held that an exception to the normal distribution policy combined with an anti-competitive effect created a per se violation of the antitrust laws.

Brief for Petitioner at 10. *Com-Tel* was not "based on" *GTE Sylvania,* but distinguished itself from that case. In *GTE Sylvania,* the Supreme Court held that a vertical restraint on trade, specifically, a location restriction on sales by Sylvania franchisees, should be judged under a rule of reason standard. *GTE Sylvania,* 433 U.S. at 58-9. In *Com-Tel,* the Sixth Circuit ruled that the fact that the defendant singled-out Com-Tel as an unworthy customer, and on an ad hoc basis ignored its own marketing strategy, justified application of a per se standard, in spite of *GTE Sylvania,* because the anti-competitive effect was equivalent to the effect of a group boycott, *Com-Tel,* 669 F.2d

at 411-12. In essence, *Com-Tel* created a narrow exception to *GTE Sylvania* for vertical restraints that are targeted at individual dealers and have the effect of a group boycott.

The *Com-Tel* exception does not apply to Peavey. The Sixth Circuit distinguished *GTE Sylvania* in *Com-Tel* because, "[t]he efficiencies perceived by the *Sylvania* Court as promoting interbrand competition by bolstering Sylvania's entire distribution network could not be achieved by DuKane by singling out Com-Tel for exclusionary treatment," *Com-Tel,* 669 F.2d at 412. The market conditions described by Justice Powell in *GTE Sylvania* that gave rise to those efficiencies were identical to the conditions faced by Peavey when it granted an exclusive dealership to Progressive. Justice Powell correctly observed that:

> [N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products . . . . The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product.

GTE Sylvania, 433 U.S. at 55.

The district court properly placed the burden on Olsen to demonstrate that the exclusive dealership agreement with Progressive constituted an unreasonable restraint on trade, after noting the acknowledged fact that Peavey, a new entrant into the audio equipment business, agreed to and did utilize Progressive as its exclusive dealer within a 250-mile radius of Progressive's stores. *See* App. A at 6a-7a, 8a-11a. Olsen failed to meet this burden. Moreover, the district court found ample evidence that Peavey's exclusive dealing agreement with Progressive was "pro-competitive," supported by "good and

substantial business justification," "reasonable," "not in restraint of trade," the "result of reasonable business judgment," and "valid and legal." *Id.* at 9a-11a. Clearly, given these findings, Peavey's business decisions fit precisely into the scheme described by Justice Powell in *GTE Sylvania,* and application of the *Com-Tel* exception would be totally unwarranted.

C. There is no conflict with *GTE Sylvania:* Olsen failed to prove any anticompetitive effect resulting from Peavey's agreement with Progressive.

Olsen's claim that "the Circuit Court's decision is in conflict with this Court in *GTE Sylvania,*" Brief for Petitioner at 11, is not well founded. In *GTE Sylvania,* the Supreme Court overruled *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), reimposing the "rule of reason" analysis for the examination of vertical restraints. *See GTE Sylvania,* 433 U.S. at 58-9. Significantly, Olsen does not argue that the rule of *GTE Sylvania* was improperly applied as to Peavey; Olsen instead disputes the facts found by the trial court, claiming to have proven both anticompetitive higher prices and a relevant market in which to evaluate their effect. Before discussing Olsen's assertions, it is important to note that Olsen does not actually allege any conflict among the circuits. Once again, Olsen's refrain of "conflict!" is nothing more than a cry that his alleged "facts" and "proof" should not have been held insubstantial and unsupported.

With regard to the alleged resale price fixing claims, the court specifically found that Peavey, *"according to plaintiff Olsen's testimony,* was unaware of Progressive's pricing and was not involved in any of Progressive's pricing decisions," App. A at 7a-8a (emphasis added). The evidence presented by Olsen provided the "reasonable inference" for the trial court "that there was no [price fixing] conspiracy or agreement" between Peavey and Progressive, *id.* at 7a-9a, with the strong implication, based on Olsen's own testimony, that "Progressive priced *independently* of Peavey." *Id.* at 8a-9a (emphasis in original).

With regard to Olsen's relevant market, Olsen introduced no credible proof of the relevant product market in his effort to show restraint of trade. Olsen offered no evidence of the market shares or market power held by any defendant manufacturer or Progressive in *any* markets, including the alleged "quality" audio market. Naturally, this absence of evidence made it impossible for the district court to determine if trade or commerce had been restrained at all, much less unreasonably restrained. In these circumstances, Peavey properly was entitled to judgment as a matter of law. *See Determined Productions, Inc. v. R. Dakin & Co.*, 514 F. Supp. 645 (N.D. Cal. 1979), *aff'd*, 649 F.2d 866 (9th Cir. 1981).

Olsen now, for the first time, attempts a new market definition. He argues:

> As to proving the effect in a relevant market, the petitioner established the relevant market was professional instrument [sic] as opposed to amateur instrument [sic]. *See, Eastman Kodak Co. v. Southern Photo Material Co.*, at 273 U.S. 376 (1927). [sic].

Brief for Petitioner at ll. Olsen then contends that the lower courts rejected his asserted "relevant market," creating a conflict with *Eastman Kodak*. Again, there is no conflict. Yet another time, Olsen confuses his own allegations with the findings of the trial court. Most significantly, Olsen did not even allege the professional versus amateur distinction below, where he argued that "quality" audio equipment was the relevant market. *See Olsen v. Progressive*, 703 F.2d at 436. Regardless of the label Olsen seeks to attach, his market definition is vague and unproven.

D. There is no conflict with *Continental Ore:* the dismissal of Peavey because Olsen could not prove a conspiracy does not constitute the dismembering of an alleged conspiracy.

Olsen again seeks to substitute his naked allegations for the findings of the trial court by claiming he proved the existence of

a conspiracy. Olsen is correct in noting that only a small amount of evidence is necessary to join a defendant to a proven conspiracy. However, the cases Olsen cites, which are discussed below, make clear that it is the responsibility of the trier of fact — here the trial judge, and not Olsen — to determine if that small amount of evidence has been shown.

In *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir. 1978), *cert. denied*, 437 U.S. 903 (1978), the question was whether Cadillac had participated in a proven conspiracy. There, the Fifth Circuit deferred to the findings of the trial court: "The trial judge heard the evidence, assessed the credibility of all the witnesses, and found that Cadillac was a participant. . .," *id.* at 1087. *Morton Salt Co. v. United States*, 235 F.2d 573, 579 (10th Cir. 1956) is in accord. The trial court *instanter*, with proper review by the Tenth Circuit, weighed the same factors and found that Peavey did not participate in a conspiracy. The trial judge stated, with regard to Peavey, that the "court has weighed all of the evidence and the reasonable inferences to be drawn therefrom and has concluded that the plaintiff has not met its burden or made out a case, based on persuasive evidence in the record, from which an inference can be drawn that. . . Peavey conspired with any other defendant or unnamed co-conspirator . . . ," App. A at 6a. On review, the Tenth Circuit ruled that "[t]he district court drew permissable inferences based upon the record evidence," *Olsen v. Progressive*, 703 F.2d at 436. Unquestionably, Olsen failed to prove a conspiracy.

Olsen equates the dismissal of an unproven, alleged co-conspirator with the dismemberment of a proven conspiracy. In doing so, Olsen misconstrues what the Supreme Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), described as "dismembering the conspiracy" and wrongly applies it to the facts of this case. The *Continental Ore* court rejected the lower courts' compartmentalized consideration of the facts alleged to constitute a conspiracy. *See id.* at

698 (lower court "examined *seriatim* the [5 alleged instances of interference] and ruled separately upon the . . . damage to Continental in connection with each of these episodes"). In this case, the lower courts considered Olsen's evidence in its entirety, and gave him "the full benefit of [his] proof," *id.* at 698-99. Olsen simply failed to meet his burden as to Peavey in the eyes of the trial judge.

III. THE LOWER COURTS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

A. The district court applied the proper standard of judgment for an involuntary dismissal at the close of Olsen's evidence in a case tried to the court.

The trial court weighed the evidence and inferences therefrom, without making any special inferences in Olsen's favor, and determined that Olsen had failed to establish a case against Peavey. This is the proper role for the district court under Peavey's motion.

Olsen cites *Continental Ore* for the proposition that a court "must consider the evidence in its strongest light in favor of the party against whom the Motion for a directed verdict is made and must give him the advantage of every fair and reasonable intendment that the evidence can justify," Brief for Petitioner at 12 (quoting *Continental Ore,* 370 U.S. at 696). However, Olsen is confused again: Olsen's case was tried to the court, not to a jury, and a motion for judgment at the close of plaintiff's case requires the application of a standard entirely different from a directed verdict.

> In [granting defendant's motion for judgment at the close of plaintiff's case], the court is not as limited in its evaluation of plaintiff's case as it would be on a motion for directed verdict. The court is not to make any special inferences in the plaintiff's favor . . . . Instead, it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies.

9 Wright & Miller, Federal Practice and Procedure § 2371 (1977). *See, e.g., Emerson Electric Co. v. Farmer,* 427 F.2d 1082, 1086 (5th Cir. 1970) (distinguishing directed verdict); *Woods v. North American Rockwell Corp.,* 480 F.2d 644, 645-46 (10th Cir. 1973) (no special inferences); *Rutledge v. Electric Hose & Rubber Co.,* 511 F.2d 668, 676 (9th Cir. 1975) (must weigh the evidence).

The Tenth Circuit rightly characterized as "unfounded" Olsen's contention that, on Peavey's motion for dismissal pursuant to Fed. R. Civ. P. 41(b) in a case tried to the court, he is entitled to have the evidence viewed in a light most favorable to him. *See Olsen v. Progressive,* 703 F.2d at 436. *Continental Ore,* a case tried to a jury, is utterly inapplicable in this context.

B. The Tenth Circuit correctly found that the district court's dismissal of Peavey was not "clearly erroneous."

The standard of review on appeal of an involuntary dismissal under Fed. R. Civ. P. 41(b) is stated in Fed. R. Civ. P. 52(a):

> In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The Tenth Circuit applied the "clearly erroneous" test and affirmed the dismissal of all allegations against Peavey. The court correctly observed that, "[a] choice between two permissible views [of the record evidence] is not 'clearly erroneous,'" *Olsen v. Progressive,* 703 F.2d at 436 (quoting *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.,* 571 F.2d 1144, 1148 (10th Cir. 1978), *cert. denied,* 439 U.S. 862 (1978). *Cf. Commissioner v. Duberstein,* 363 U.S. 278, 291 (1960) ("clearly erroneous" means that reviewing court on reviewing

the whole evidence is left with a definite and firm conviction that a mistake has been made). Indeed, the district court made several inferences in Olsen's favor even though it was not bound to do so. *See* App. A at 6a. Despite its unnecessary reach beyond the Federal Rules of Civil Procedure to make inferences in favor of Olsen and give him every opportunity to show he was entitled to relief, the district court still could not substantiate any of the claims against Peavey. The Tenth Circuit properly affirmed the inferences, conclusions and finding of the trial judge as not "clearly erroneous." There is no error, therefore, and no conflict with the other circuits.

PEAVEY'S MOTION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

IV. OLSEN'S PETITION IS FRIVOLOUS AND PEAVEY IS ENTITLED TO DAMAGES PURSUANT TO SUPREME COURT RULE 49.2.

Rule 49.2 of the 1980 revisions to The Supreme Court Rules provides in pertinent part:

> When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

This rule should be invoked where a petitioner carelessly misstates applicable precedent and dogmatically asserts that his unsubstantiated allegations constitute "proven" facts in an effort to contrive issues appropriate for review by this Court.

Attorneys have been on notice since the 1980 revisions to the Supreme Court Rules that frivolous petitions might result in an award of damages to the opposing party. *See* E. Gressman & R. Stern, ***Supreme Court Rules: The 1980 Revisions*** 30 (1980) ("Rule 49.2 rewrites and simplifies a little-used but appropriate warning to counsel . . ."). Recently, this Court invoked Rule 49.2 for the first time, ***Tatum v. Regents of Nebraska - Lincoln,***

51 U.S.L.W. 3879, 3883 (June 13, 1983) (No. 82-6145), and threatened Rule 49.2 damages in three other cases. *See Garcia v. United States,* 51 U.S.L.W. 3879, 3883 (June 13, 1983) (No. 82-5934); *Escofil v. Pennsylvania,* 51 U.S.L.W. 3879, 3883 (June 13, 1983) (No. 82-6193); *In re Rush,* 51 U.S.L.W. 3879, 3883 (June 13, 1983) (No. 82-6502).

This case provides the Court with the opportunity to develop a fair standard for the evaluation of "frivolous" petitions for certiorari under Rule 49.2. After four years of discovery, Olsen was allowed to present his evidence against Peavey at a trial consisting of 27 trial days—it was found to be incomplete, insubstantial and unconvincing as a matter of fact. Olsen now seeks the reinstatement of these claims. Olsen's continuing refusal to accept the fact of the insufficiency of his evidence is absolutely unsupportable, and has required Peavey to incur unjustified costs approximating $1,500 and attorneys fees that will approximate $4,000. As is evident, Olsen has continually misstated both the facts and the law in an effort to prolong the disposition of this case. The appellate process should not be abused by clogging the courts with burdensome and unnecessary appeals. *Cf. N.L.R.B. v. Catalina Yachts,* 679 F.2d 180 (9th Cir. 1982) (frivolous appeal is one where result is obvious and arguments are without merit).

Several Justices of this Court have stated, with some urgency, that this Court is overloaded with frivolous and unsubstantiated petitions for certiorari. Recently, Chief Justice Burger observed that:

> [a]t least 3000 of the more than 4500 new filings each year fall into [the "utterly frivolous"] category. Increasingly, lawyers have drifted away from the old standard that when they put their name on any paper filed with the Court, they vouch that, in the lawyer's best professional judgment, the question warrants review by the Supreme Court.

Chief Justice Burger's Challenge to Congress, U.S. News & World Rep. 38 (Feb. 14, 1983). The Chief Justice has also stated, "[A] lawyer has not only the right, but a duty, to decline to press a frivolous case and impose burdens on the courts, while legitimate claims wait to be determined." *Unclogging The Courts - Chief Justice Speaks Out, Interview with Warren E. Burger,* U.S. News & World Rep. 36 (Feb. 22, 1982).

Supreme Court Rule 49.2 is a prudent measure by which to curb the increasing flow of insubstantial appeals to this Court through attorney self-regulation. To accomplish this necessary end, this Court should apply Rule 49.2 to Olsen's petition, and others like it, which couch what is merely a request for a *de novo* review of the trial judge's factual findings by concocting frivolous legal issues it claims are appropriate for Supreme Court review.

CONCLUSION

For the foregoing reasons, Peavey Electronics Corporation respectfully requests that this Court deny Petitioners' request for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Peavey Electronics Corporation also prays that this Court award it damages pursuant to Supreme Court Rule 49.2.

Dated this 15th day of July, 1983.

Respectfully submitted,

GARDERE & WYNNE
Original Signed by
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., *Plaintiffs,* v. PROGRESSIVE MUSIC SUPPLY, INC., et al., *Defendants.*	ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS UNDER RULE 41(b) C 75-0153

I. FACTUAL BACKGROUND

In 1964 plaintiff Clair Olsen, along with George Best and Earl Reed, organized a corporation under the laws of the State of Utah entitled "Guitars, Inc." Mr. Reed died in approximately 1967 and his interest was purchased by Steven Hight. Guitars, Inc. opened a store in Bountiful, Utah, which operated under the trade name of Guitar City Studios. In 1966, another store was opened in Kaysville, Utah, which later became connected with Guitars, Inc., and also operated under the trade name of Guitar City Studios. These stores were engaged in the business of selling musical instruments and equipment for sound reproduction. Plaintiff Olsen operated the Kaysville store and George Best operated the Bountiful store.

Until 1970 the corporation functioned basically as a purchasing entity for the two stores. Each individual, Olsen and Best, would place his orders through the corporation and each

individual was to be responsible to pay for his orders. The corporation, besides ordering instruments for the stores, paid half of the telephone bills of each store and held the franchises in its name. The ordering function, the holding of the franchises, and the paying of the telephone bills were essentially the only functions of the corporation. The stores placed proceeds from the sales of instruments into the corporation from which the bills were paid and the purchases of instruments made. All other bills of each store were handled separately by each store. Funds left in the corporation after payment for the instruments and telephone bills were divided so that the person making a sale received a commission therefor and any profits left over after payment of commissions were to be divided in thirds among Best, Olsen, and Hight.

During 1970, disagreements arose between plaintiff Olsen and George Best, and several discussions took place concerning dissolution of the corporation. In July, 1970, it was decided to keep the corporation alive to continue serving as a purchasing entity for the two stores. In October, 1970, however, a separation agreement was executed by Olsen and Best which essentially terminated all other relations between them. Each began conducting distinct business operations, essentially as sole proprietors of each store, although the corporation still served as a purchasing entity. In January of 1971, Olsen attempted to sell his store in Kaysville without consulting with or obtaining permission from Best. In May of 1971, Best entered into a brokerage agreement with the defendant Progressive Music Supply, Inc. (Progressive), one of the largest retail music instrument dealers in Utah. During this period of time, Best was still functioning as president of Guitars, Inc. This situation led to many internal conflicts in Guitars, Inc., and several attempts were made by the parties to dissolve the corporation or require Best to retire.

Olsen claims that in 1972 he brought suit against Best, and the litigation resulted in a settlement wherein all the interest in Guitars, Inc. was assigned to Olsen. In February of 1975 he

formed a new corporation known as Guitar City Studios, Inc., a plaintiff herein. During this time period several changes were made in his business. For example, during the period prior to 1974, Olsen operated his Kaysville store on a part-time basis only. In 1974 he moved his location and commenced business on a full-time basis and has so continued through the relevant period. In addition, he added a repair service to his business, which significantly increased his sales potential.

Following these changes in business operation, plaintiffs' sales increased dramatically. Prior to 1974, plaintiffs sold approximately 7% of the volume that was sold by defendant Progressive during that period of time. After going full time in 1974, plaintiffs' sales rose rapidly until in 1977 they were approximately 70% of defendant Progressive's sales. This was a remarkable accomplishment in view of plaintiffs' assertions that Progressive was the market leader in Utah and held exclusive franchises or dealerships for several products claimed to be essential to the inventory of a competitive music store. Thus, in the short space of three years, and without the claimed leading lines, plaintiffs' business grew from a small and insignificant part of the market to a size of substantial comparability to the largest dealer in Utah.

After Best had entered into the brokerage agreement with Progressive in 1971, Olsen experienced alleged difficulties in obtaining musical instruments from various manufacturers, which ultimately became the basis of this action. All of the defendant manufacturers named in the present litigation allegedly were willing to make Olsen a dealer, but later refused to sell to Olsen due to commitments to Progressive. Olsen was thus forced to obtain their instruments through other dealers at higher cost, allegedly causing financial loss. As a result, in April of 1975 Olsen and his new corporation, Guitar City Studios, Inc., brought suit against Progressive and six manufacturers.

A non-jury trial was held and presently all of the manufacturers, except Acoustic Control Corporation (Acoustic) and Peavey Electronics Corporation (Peavey), have been dismissed

from the action, either by stipulation of the parties or by order of the court. These two, with Progressive, remain in the case. The claims involve various alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2 (Supp. 1980).

At the trial, after the conclusion of plaintiffs' case, oral arguments were scheduled on a motion to dismiss filed by the remaining defendants under Rule 41(b) of the Federal Rules of Civil Procedure. Argument was heard on July 31, 1979. At the hearing defense counsel indicated that he was reserving the right to put on some evidence and therefore intended only to argue the motion to dismiss and not finally submit the case. Because of urgent time constraints of the parties, and at their request, the court accordingly heard argument on the Rule 41(b) motion and allowed them to file supplementary briefs. The final memorandum was submitted in December, 1979. The court has reviewed the voluminous briefs, the arguments of counsel and the record, and deems itself advised and prepared to make a ruling.

II. PLAINTIFFS' CLAIMS

The plaintiffs allege violations of sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1, 2 (Supp. 1980), by Progressive, Acoustic, and Peavey. Specifically, plaintiffs allege that Progressive conspired separately and jointly with each manufacturer to fix prices, establish Progressive as each manufacturer's exclusive dealer in the state of Utah (or in the case of Peavey a 250-mile radius), terminate plaintiffs' dealing in each manufacturer's products (except as against Peavey), and boycott the plaintiffs' business. Plaintiffs further complain that Progressive conspired with certain unnamed co-conspirators, i.e., George Best, CBS Musical Instruments (CBS), and Bobbie Herger in violation of section 1 of the Act. Plaintiffs assert that Progressive conspired with Best to cause plaintiff to lose franchises, to destroy plaintiffs' credit and business reputation, to take over plaintiffs' business location and terminate plaintiffs' corporate charter, to fix prices, and to cause manufacturers to boycott plaintiffs' business. Plaintiffs further allege that Pro-

gressive and CBS, with the help of Herger, conspired to establish Progressive as CBS's exclusive dealer for the state of Utah, to fix prices, to terminate plaintiff as a CBS dealer, to boycott plaintiffs' business and to cause CBS to require other dealers not to sell CBS products to plaintiffs. Finally, plaintiffs allege that the defendants conspired together to boycott plaintiffs and to attempt to monopolize the Utah market in certain musical instruments. (Pre-trial Order, filed April 5, 1979).

As to section 2 of the Act, plaintiffs complain that Progressive attempted to monopolize the Utah retail market in quality synthesizers, quality amplifiers, and quality electronic and acoustic guitars. "Quality" was defined as guitars and amplifiers retailing for over $300 and synthesizers retailing for over $700. (Plaintiffs' Memorandum in Opposition to Defendant Progressive's Motion for Summary Judgment, Exhibit 17(g) ¶3; Supplementary Transcript, Vol. VII, p. 182). The defendants specifically deny any acts in violation of sections 1 and 2 of the Sherman Act, and deny any monopoly or attempt to monopolize, or any price-fixing, boycotting or other restraint.

A. SECTION 1 VIOLATIONS

Section 1 of the Sherman Act provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C.A. § 1 (Supp. 1980). To establish a violation of § 1 of the Sherman Act, plaintiffs must show three elements: 1) a contract, combination or conspiracy; 2) affecting interstate commerce; and 3) an unreasonable restraint of trade. *See, e.g., Mowery v. Standard Oil Co. of Ohio,* 463 F. Supp. 762, 765 (N.D. Ohio 1976), *aff'd,* 590 F.2d 335 (6th Cir. 1978). Plaintiffs acknowledge that some sort of concerted action must exist in order for a claim to come within this section. However, they cite several cases in their brief filed on November 8, 1979, to the effect that an express or formal agreement need not be

proved, and that rational and reasonable inferences may be drawn to support a finding of an agreement or a conspiracy from evidence giving rise to such inferences, and that such a finding may be based solely upon such inferences. *See, e.g., Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 221-23 (1939); *Westman Comm'n Co. v. Hobart Corp.,* 461 F. Supp. 627, 629, 631-32, 635-36 (D. Colo. 1978). The court accepts the support the rulings in these cases provide in considering reasonable inferences to help resolve the issues in this case.

The court has weighed all of the evidence and the reasonable inferences that may be drawn therefrom and has concluded that the plaintiff has not met its burden or made out a case, based on persuasive evidence in the record, from which an inference can be drawn that either Acoustic or Peavey conspired with any other defendant or unnamed co-conspirator in violation of section 1. The court also finds that plaintiffs were never dealers during the relevant period for manufacturers Acoustic or CBS. Thus, plaintiffs' claims in the pre-trial order that some of the defendants agreed with other entities to terminate plaintiffs' Acoustic and/or CBS dealership must fail. The court does find, however, that there is evidence in the record from which reasonable inferences might be drawn to support a conclusion that Progressive conspired with CBS and/or Mrs. Bobbie Herger of Herger's Music in Provo, Utah, to fix prices on CBS products and to divide the market and boycott plaintiffs from obtaining CBS products from CBS's dealers, and that such an agreement affected interstate commerce and was in restraint of trade, as discussed hereinafter. There also remains the question whether or not such a violation, if found, caused recoverable damage to these plaintiffs during the relevant period.

1. Alleged Agreement or Conspiracy Between Acoustic or Peavey and Progressive

Any agreement between Acoustic or Peavey, both of whom are manufacturers of musical instruments and equipment, and Progressive, a retailer, would properly be characterized as a

vertical agreement. The Supreme Court recently expressed its view that vertical agreements may give rise to violations, but should be governed under the rule of reason as explained in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977). The Court acknowledged, however, that vertical agreements or restrictions, "in varying forms, are widely used in our free market economy," and "there is substantial scholarly and judicial authority supporting their economic utility." 433 U.S. at 57-58. Consequently, though characterized as a vertical agreement, plaintiffs still must show the anticompetitive effects of any such agreement in addition to showing that such an agreement existed in accordance with the elements of a section 1 violation as mentioned above, 433 U.S. at 58-59, unless the subject matter of such agreement falls within a *per se* violation category such as resale price maintenance. 433 U.S. at 51 n. 18.

Plaintiffs claim that Peavey conspired with Progressive to establish Progressive as an exclusive dealer within a 250 mile radius, to boycott the plaintiffs, and to fix prices. They assert that Acoustic conspired with Progressive to establish Progressive as an exclusive dealer in Utah, to terminate plaintiffs as an Acoustic dealer and boycott them, and to cause Acoustic to contact plaintiffs' customers and discourage them from dealing with plaintiffs. It is also argued that Progressive, Acoustic and Peavey conspired with other manufacturers to boycott the plaintiffs and to attempt to create a monopoly on behalf of Progressive. Pre-trial Order, filed April 5, 1979.

As to Peavey specifically, the defendants claim the evidence indicates Progressive set its own prices independently of Peavey, and above Peavey's recommended price list. Peavey, according to plaintiff Olsen's testimony, was unaware of Progressive's pricing and was not involved in any of Progressive's pricing decisions. Olsen testified that he spoke with Hartley Peavey of Peavey at a trade show in 1972 about his knowledge of Progressive's pricing practices. Mr. Peavey indicated that he was unaware of what Progressive was doing about pricing in

Utah. (Transcript Vol. V, p. 1303). The only other evidence even remotely relating to a Progressive-Peavey price-fixing conspiracy is certain testimony of Michael Draper. Draper, a one-time employee of Progressive, testified concerning a conversation he had with Don Penman of Progressive in which Penman related a discussion he had with Hartley Peavey regarding prices. It was to the effect that Penman told Peavey not to publish list prices in a trade magazine on his products in Progressive's area. On one occasion, Hartley Peavey apparently forgot about Penman's request and did publicize prices. When asked not to do so again by Penman, Peavey discontinued the practice. It is to be remembered there were no other dealers involved in this transaction. The reason cited in the testimony for Penman's request that Peavey not publicize list prices was that due to costs of shipping the products to Utah, and costs involved in building up inventories, Penman needed to charge higher prices, and that the market could command higher prices in Utah. (Supplemental Transcript Vol. I pp. 59-62).

The reasonable inference from the evidence presented on the alleged price-fixing conspiracy between Progressive and Peavey is that there was no such conspiracy or agreement, since Peavey did not know of Progressive's selling prices and those prices were above the published list. This evidence strongly implies that Progressive priced *independently* of Peavey. Certainly, had the price been set *below* the list price in an apparent attempt to undercut competition, a different inference might arise. Or, if Peavey received kickbacks out of an increased profit margin of Progressive, made possible by its exclusive dealership and higher prices received for the products above list prices, a different inference might arise. The fact that Progressive's prices were *above* Peavey's list prices, and the absence of any evidence of any kickbacks or benefits to Peavey, indicate that Peavey did not benefit in any way from the higher prices and strongly imply an absence of any intent on Peavey's part to set those prices. The fact that Peavey forgot about Penman's

request not to publish list prices strongly suggests little or no cognizance on the part of Peavey at that time concerning Penman's request. Peavey was apparently not thinking about what Penman was doing in Utah with regard to price. The court finds that there was no price-fixing agreement between Progressive and Peavey which has been established by the evidence.

There is also no credible evidence that Progressive and Peavey or anyone else conspired to create a monopoly on behalf of Progressive, or entered into any other illegal or anticompetitive agreement to boycott plaintiffs with respect to Peavey products. The court notes that there was evidence presented to the effect that Progressive was installed as Peavey's exclusive dealer in Utah. However, exclusive dealing agreements are viewed under the rule of reason as noted above, in light of their economic utility and competitive impact.

There was testimony to the effect that Peavey offered a popular product, but had limited manufacturing capabilities. As a result, retail dealers had a heavy demand for the product but limited supply. Thus, dealers could readily sell Peavey products on the retail market for full price and would have little incentive to sell the products to a competing dealer at a discount. Further, the limited supply and delivery delays meant that it was difficult to keep Peavey products in stock. Under these conditions, dealers would have little reason to sell the product to a competitor. (Transcript, Vol. III, pp. 657-59; Vol. VII, pp. 1735-36). Thus, the fact that Olsen could not purchase Peavey products from other dealers is credibly and amply explained by pro-competitive factors.

Furthermore, there is good and substantial business justification in the record to support the conclusion that Progressive's exclusive dealership in Peavey products during the relevant period of time was reasonable and pro-competitive and not in restraint of trade. Between 1971 and 1973 Peavey was far from the top of the product lines. Testimony of Michael Draper

indicated that Peavey could not compete with other manufacturers until approximately 1974 or 1975. (Transcript, Vol. I, pp. 28-29). The record also indicates that during the time in which Peavey was entering the market, Progressive was one of the largest dealers in Utah, and Olsen's store was still quite small and only operated on a part-time basis. Under these circumstances, the court finds that Peavey's relationship with Progressive was a result of reasonable business judgment, and viewed under the rule of reason was valid and legal.

The record also lacks credible evidence with which to support an inference of price-fixing, boycotting or other anti-competitive agreements between Acoustic and Progressive during the relevant period. There was evidence that Progressive sometimes followed Acoustic's recommended price, but at other times sold at higher prices. There is no evidence indicating that Acoustic was in any way involved in Progressive's pricing decision. With regard to alleged boycotting of plaintiffs, Olsen testified that he believed Acoustic had accepted him as a dealer at a trade show in 1974 and had confirmed the relationship when a representative visited Utah later in the year, and then had terminated Olsen's franchise as a result of an agreement with Progressive to do so. (Transcript, Vol. V, pp. 1339-50, 1355-66). The testimony of Acoustic's representative, Aspen Pittman, was to the contrary. According to Pittman, he and Olsen discussed the *possibility* of Olsen's becoming a dealer, pending Pittman's investigation of the current situation in Utah, including Acoustic's *existing* commitment to Progressive. Pittman further testified that he did not make any further commitment to Olsen when he visited his store in May, 1974. Rather, he inspected the premises and then left to meet with Progressive. After Pittman visited Progressive, Acoustic decided *independently* and without Progressive's involvement not to open Olsen as a dealer, but to maintain the existing Progressive-Acoustic relationship. (Transcript, Vol. II, pp. 365-429).

The court finds Pittman's testimony on this point the more persuasive. At the time of the trade show, Pittman had never been to Utah. It is unlikely that, under those conditions, he would have accepted Olsen as a dealer at that time. Further, in earlier deposition testimony, Olsen indicated that Pittman had told him that he would have to inspect Olsen's facilities before making a decision on whether to open Olsen as a franchise. (Deposition of Clair Olsen, Vol. II, pp. 43-46). Since the court concludes that Acoustic did not accept Olsen as a dealer, there can be no viable claim that Progressive and Acoustic acted together to terminate Olsen's Acoustic dealership.

The court finds that there is no substantial evidence to indicate that Acoustic acted in concert with Progressive in deciding not to open Olsen as a dealer. The simple fact that Acoustic made the decision regarding Olsen after Pittman visited Progressive is not enough to support an inference of conspiracy. It would appear to the court that it would be a logical, good business practice for Pittman to investigate existing commitments prior to making decisions about new dealers.

Thus, any agreements which may have existed between Peavey or Acoustic and Progressive which can be inferred from the evidence were made under conditions providing substantial business justification and were reasonable and procompetitive and therefore not violative of section 1. This conclusion is drawn not only from the circumstances governing Peavey's entry into the market and Acoustic's market stature, but also from plaintiffs' own evidence and market performance which failed to show any anticompetitive effect of any such agreements.

Similarly, the court has found no evidence of agreement or conspiracy between Acoustic and Peavey horizontally at the manufacturer level and Progressive at the retail level to boycott plaintiffs and create a monopoly in favor of Progressive. The court has found no evidence linking any of Peavey's activities to any of Acoustic's, and any agreement either one of them

individually may have had with Progressive has been dealt with in the above analysis. Therefore, the motion to dismiss of Acoustic and Peavey is granted in each instance.

2. Alleged Agreement or Conspiracy Between Progressive and Unnamed Co-Conspirators

The court finds that the evidence presented in plaintiffs' case shows that Progressive prevailed upon Mrs. Bobbie Herger of Herger's Music in Provo, Utah to fix prices on CBS products. As a result of their agreement, Progressive and Herger sold at prices above the CBS list price at levels set by Progressive's own price lists. Certain testimony of Herger seems to implicate Mr. Driver of CBS in the alleged price-fixing scheme. (Transcript, Vol. I, pp. 168-71). CBS was initially named in this suit, but was dismissed by stipluation of the parties on November 20, 1975. Herger has not been named.

The initial agreement between Progressive and Herger was reached in 1967, well before the applicable damage period in this case of April 15, 1971, to April 15, 1975. However, there is evidence that the agreement continued until February, 1973. (Transcript, Vol. I, pp. 178-83; 189-92). Both Progressive and Herger had dealership agreements with CBS and by their agreement with each other further delineated certain territories. The court finds that such an agreement would be an unreasonable restraint of trade. Moreover, the "price-fixing" agreement apparent from the record here is the type of agreement among competitors to fix prices on their individual goods that has consistently been held to be *per se* violative of the antitrust laws. *See, e.g., Broadcast Music, Inc. v. CBS,* 441 U.S. 1, 8-9 (1979).

In support of the claims of price-fixing, boycotting and attempted monopolization, plaintiffs have tried to show that Progressive put pressure on CBS to fix prices and boycott or eliminate other dealers from dealing with CBS products. Most of the evidence corroborating such a claim stems from activities which occurred years before the relevant period. Plaintiffs contend that when pressure from a dealer affects a marketing

decision by a manufacturer to refuse to deal with another dealer, or if there is an element of agreement on price with a dealer, the decision will be scrutinized more closely under the antitrust laws than unilaterally-imposed vertical restrictions. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3rd Cir. 1979).

The court finds that there is some evidence in the record from which an agreement in restraint of trade between CBS and Progressive could be inferred. An affirmative link of such an agreement comes from testimony of Herger as follows:

> Q: And during the course of these conversations, at any time did you say: "Yes, I will sell at those prices"?
>
> A: Yes.
>
> Q: And when did that occur?
>
> A: In the latter part of 1967, like September.
>
> Q: And where did that conversation take place?
>
> A: It wasn't really a conversation. It was the culmination of events and conversations.
>
> Q: But did you say that to Mr. Penman?
>
> A: That we would sell?
>
> Q: Yes.
>
> A: Pressure was brought to bear.
>
> Q: What did you say to Mr. Penman?
>
> A: It was more a conversation with Mr. Driver. (The CBS sales representative).
>
> Q: Was Mr. Penman present?
>
> A: I don't remember.
>
> THE COURT: Mr. who?
>
> THE WITNESS: Mr. Driver.

Q: And at that time in 1967, did you adopt a sales price policy that was different than the one you had in the past?

A: Yes.

(Transcript, Vol. I pp. 170-71).

As noted, this conversation took place in 1967, approximately four years before the beginning of the relevant damage period. However, there is evidence in the record which strongly indicates that the agreement was still in effect and honored by the parties well into the damage period. Although Herger had been terminated as a CBS (or Fender) dealer from March to approximately December of 1971, she generally adhered to the same prices during that time on her Fender inventories. (Transcript, Vol. I, pp. 177-79). Herger wrote to the president of CBS asking to be reinstated, and upon being reinstated continued selling at the price levels set in Progressive's price lists. However, Herger ultimately prevailed upon the new CBS representative for the area, Ed Payne, in late 1972 to investigate the situation. Payne looked into the matter by checking with Progressive, indicating that CBS personnel were unaware of any pricing agreement. In February of 1973, CBS informed Herger she could sell at any price she desired. She then lowered her prices and in some instances sold below the CBS list prices. She was not contacted thereafter by Penman regarding prices. (Transcript, Vol. I, pp. 187-93). Thus, until at least February of 1973, the court could find that the price-fixing agreement was definitely in effect between Progressive and Herger.

Further, the evidence may support an inference that CBS and Progressive sought to territorialize and to refuse to deal with plaintiffs. Though CBS apparently had a strong national policy of only dealing through authorized dealers and imposing territorial restrictions on those dealers during the relevant period, there are indications that plaintiffs may have been

specifically targeted for a concerted refusal to deal or boycott instigated by CBS or Progressive through CBS. For example, Mr. Browne, a CBS dealer in California, testified concerning a meeting he had in 1974 with Mr. Bull of CBS as follows:

> Q: Can you describe what was said and by whom on that occasion.
>
> A: Mr. Bull said to me that he thought our problems were all over.
>
> I said, "I wasn't aware of any problem."
>
> At which time he said that he had discussed with me in the past the distribution policies of Fender and that he thought it was clear to me what those policies were and that I had evidentially [sic] not adhered to his wishes as the person who establishes the distribution policies of Fender and that he had found my merchandise out of my territory and that it had been sold by another dealer.
>
> Q: Did he say who that dealer was?
>
> A: Yes. The dealer was Clair Olsen.
>
> THE COURT: Who?
>
> THE WITNESS: Clair Olsen.
>
> Q: Would you continue with what was said and by whom.
>
> A: Mr. Bull told me that he did not have the right to tell me who I could and could not sell to but that it was the desire of CBS to control its distribution through authorized dealers, at which time I said I had no desire to interrupt their distribution policies.
>
> So, he explained to me that based on dealings—
>
> Very briefly let me relate that: He told me that Clair Olsen was trouble. In fact, I believe the quote was "This guy is trouble." . . . .

Q: As a result of your meeting with Mr. Bull in 1974, —let me ask that a different way:

Did that meeting in 1974 have any effect with the subsequent dealings that you had with Clair Olsen?

A: Yes, it did.

Q: Would you please describe what he said that had.

A: Well, as I mentioned, in the discussion he advised me that Clair Olsen was not an authorized dealer and that he was trouble for the authorized dealer or dealers that he had in that territory, and it was against his wishes that I sell them.

The insinuation was made that if I did sell him that, as had occurred in the past, an interruption in my supply of CBS products would occur.

Q: Did you discontinue selling to Clair Olsen for a time?

A: Yes, I did.

(Transcript, Vol. V, pp. 1240-41, 1246). Since Progressive and Herger were the only CBS dealers in Utah and since Progressive apparently exerted influence upon CBS to restrict Herger's business and territory, and control prices, it is reasonable to infer that Progressive may have been in collusion with CBS to boycott plaintiffs. The court finds that the evidence presented may well support an inference that Progressive, CBS and/or Herger engaged in anticompetitive agreements, including the price-fixing and boycotting agreements as described above. The court finds no evidence, however, that Olsen was a CBS authorized dealer during the relevant period and, thus, the alleged agreement between Progressive and CBS to terminate Olsen as a CBS dealer cannot be a basis of liability.

Plaintiffs also claim that Progressive conspired with George Best, an unnamed co-conspirator, to take over plaintiffs' business and franchises, ruin plaintiffs' business, fix prices

and boycott plaintiffs. To support these claims, plaintiffs point to the fact that Best entered into a brokerage agreement with Progressive in 1971. Plaintiffs describe Progressive's actions in obtaining Best's services as "pirating" away one of plaintiffs' employees. Plaintiffs also argue that the purchase of the building in which Best had his store from Murray First Thrift and Loan by Progressive's Utah agent indicates an agreement to appropriate plaintiffs' Bountiful store. Finally, plaintiffs rely on the deception caused by Best in running an advertisement in the Salt Lake City telephone directory under Guitar City Studios which stated "See Progressive Music."

Considered separately or together, the three facts referred to above do not establish any of plaintiffs' claims concerning an unlawful Progressive-Best conspiracy. Plaintiffs' characterization of Progressive's signing Best to a brokerage agreement as wrongful is incorrect. The record is clear that Olsen and Best entered into a separation agreement in October of 1970, after which Olsen's store in Kaysville and Best's store in Bountiful essentially operated as separate businesses. Although the corporate charter was still in existence until years later, as early as January, 1971, Olsen tried to sell his store without consulting Best, indicating that both Best and Olsen were free to act independently. The signing of Best was completely consistent with Progressive's policy of maintaining its large network of dealers. In fact, Progressive approached Olsen to inquire whether Olsen desired to become a Progressive broker. There is nothing to indicate that Best's becoming a Progressive broker was not lawful under the antitrust laws. Similarly, the purchase of the Bountiful building from a bank, where Best had his store, can hardly be described as appropriating plaintiffs' store or as wrongful. The court also notes that the purchase occurred after the 1970 separation agreement was executed.

The court is concerned with the deceptive advertisement placed in the Salt Lake telephone directory, most likely by Progressive's agent. This advertisement ran until Olsen and Best settled their differences, including the use of the name,

during litigation between them. Thereafter, Olsen used the name exclusively. Prior to the settlement, each person apparently had as much right to use the name as the other. Consequently, the advertisement was only partly accurate and impacted unfairly on plaintiffs. Although indicating some concerted action by Best and Progressive to diminish the competition resulting from Olsen's store, the advertisement standing alone is insufficient to establish a Progressive-Best conspiracy that violates section 1 of the Sherman Act. The court finds, however, that Progressive's actions with Best may be of assistance in considering the claims of Progressive's predatory intent towards plaintiffs and lend some credibility to the inferences of anticompetitive agreements between Progressive and others (CBS and Herger).

Before proceeding to the Sherman Act section 2 claims, there are two miscellaneous items that merit some attention. First, in Plaintiffs' Brief in Opposition to Defendants' Rule 41(b) motion, at pages 64-67, plaintiffs argue that defendants engaged in certain unfair trade practices which violated the Federal Trade Commission Act, 15 U.S.C. §§41-58. Since this might possibly be construed as a theory of recovery in addition to the Sherman Act claims, the court desires to make clear that it has not considered this claim as an independent basis for relief. Rather, it has been treated as an attempt by plaintiffs to bolster their claim of conspiracy to fix prices. The failure to plead such a theory of recovery, the absence of any such claim in the pre-trial order, the lack of any oral argument on the issue, and the language of plaintiffs' argument on the point (see the last paragraph of page 67 of plaintiffs' brief filed July 25, 1979) convince the court that violations of unfair trade practices were not asserted as a separate ground for relief. Furthermore, the sections cited by plaintiffs do not provide a private cause of action. *Carlson v. Coca Cola Co.*, 483 F.2d 279 (9th Cir. 1973).

Second, plaintiffs have argued in their briefs in opposition to defendants' 41(b) motion that Progressive violated section 1 of the Sherman Act as a result of its consignment/broker

program. It is alleged that Progressive fixed prices with its network of brokers and agreed to divide the market territory among them. This theory of liability first appeared in plaintiffs' filings in opposition to the present motion. It was not contained in the pre-trial order nor were the brokers mentioned as unnamed co-conspirators even though the court recalls asking plaintiffs to name specifically all unnamed co-conspirators at the pre-trial conference. Such circumstances allow the defendants to argue persuasively that the plaintiffs' contention should be rejected as untimely and outside the scope of the trial. The court does not think that it would be incorrect to exclude plaintiffs' latest theory because of lack of timeliness, but it notes that some evidence on the issue was received at trial and that plaintiffs have made some effort to move the court to amend the complaint to conform to the evidence on the price-fixing issue. (Plaintiffs' Brief in Opposition to Defendants' Rule 41(b) Motion, at 41, filed July 25, 1979). Evidence that was received on this issue is insufficient to establish any Sherman Act section 1 violation for which plaintiffs could recover. While liability can exist where a consignment scheme is simply a cloak for the distributor to fix prices with independent dealers, there is no liability if the dealer is an actual agent of the distributor with regard to the distributor's goods. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). The evidence fails to establish that Progressive's brokers were anything other than its agents. (See Transcript Vol. X, pp. 2268-72). Thus, the consignment was not shown to be improper. Also, the evidence is insufficient to support a finding that Olsen was damaged by Progressive's relationship with its brokers. The court concludes, therefore, that no recovery is available under this newly-asserted theory.

In summary of the court's Sherman section 1 rulings, the court dismisses plaintiffs' section 1 claims against Peavey and Acoustic. The court furthermore dismisses any remaining claims against Peavey and Acoustic which may fall within section 2, having found no evidence of any anticompetitive dealing between Peavey and/or Acoustic and Progressive and

there being no basis for attempted monopoly or monopolization claims against either Peavey or Acoustic. Plaintiffs' claims against Progressive under section 1, involving CBS and Herger, remain in the action to await the defense to be proffered by Progressive.

B. PLAINTIFFS' SECTION 11 CLAIMS

1. Monopolization and Attempted Monopolization

Plaintiffs have claimed that Progressive had attempted to monopolize the Utah retail market in certain musical instruments. In order to make out a claim based on an attempt to monopolize, plaintiffs must show a specific intent to monopolize and a dangerous probability of success. *Swift and Co. v. United States,* 196 U.S. 375 (1905). Under the leading Tenth Circuit case in this area, *E.J. Delaney Corp. v. Bonne Bell, Inc.,* 525 F.2d 296 (10th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976), plaintiffs must offer

> proof of market power, or market position (with a definition of the relevant market) . . . in addition to the proof of specific intent. The power must be shown to exist in the relevant market, and this power must create the "dangerous probability" . . . of the power to control prices and to exclude competition.

Id. at 305.

Plaintiffs have failed to offer the proof required by *Bonne Bell.* First, there are significant problems with the evidence relating to the relevant product market. There was very little admissible evidence to show that the product market plaintiffs defined in their complaint is composed of a unique set of products, distinguishable from products selling for less money. In short, the plaintiffs failed to show that the products included in the market definition were not "reasonably interchangeable" and competitive with less expensive products. *United States v. E. I. DuPont de Nemours & Co.,* 351 U.S. 377, 395 (1956). Without evidence of a sufficiently discrete and separable pro-

duct market, the court cannot gauge the defendant's potential for inflicting economic harm. For example, even if plaintiffs had shown that Progressive had a substantial share of the market in certain instruments retailing for over $300, that would not necessarily lead to the conclusion that Progressive had attempted to monopolize the *relevant* market. (See Supplemental Transcript, Vol. VII, pp. 182-83). If instruments selling for $250 were interchangeable and competitive with those selling for over $300, one would have to know Progressive's share of the $250 market in order to determine whether Progressive had a market position such that it would restrain competition.

Second, even assuming that plaintiffs did show a product market, they failed to prove that Progressive had a controlling position in that market. In fact, plaintiffs' own expert, Mr. Scott Lloyd, testified that the information submitted in this case did not show Progressive's percentage share of the market. Without this, the court is unable to make any finding as to the dangerous probability that Progressive could monopolize the market. Under *Bonne Bell,* such a finding is a prerequisite to a successful claim. Plaintiffs have failed in their burden of proof on this issue, and the section II [sic] attempt and monopolization claims should be dismissed.

Furthermore, the real situation demonstrated by the evidence is that the market has been quite open for competition. Plaintiffs' sales have increased substantially since Olsen turned his efforts from part-time to full-time in 1974. Olsen has achieved a relatively high proportion of Progressive's sales, around 70% according to the evidence. The court has interpreted the over-all import of the evidence to show a high cross-elasticity of demand in the market and a high level of price consciousness. These factors indicate not only that Progressive has not been able to dominate the market, even if it tried, but also indicate that plaintiffs have a serious problem showing damage. Actually, they have done better in the market without

certain products on which Progressive had exclusive franchises than they did after obtaining the right to sell some of them. In short, the market was not as product conscious as plaintiffs' claims would indicate, but was very price conscious. This allowed plaintiffs to more effectively enter the market. Any higher prices charged by Progressive only facilitated plaintiffs' entry into the market, as shown by the evidence in this case. Therefore, the section 2 attempt and monopolization claims are dismissed.

2. Conspiracy to Monopolize

Plaintiffs also claim a combination or conspiracy to monopolize under section 2 which they claim needs no proof of dangerous probability or relevant market. (See plaintiffs' Memorandum of July 25, 1979, at 76-78). The offenses involved in section 2 of monopolization, attempt to monopolize, and conspiracy to monopolize are separate offenses requiring different proofs. *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 709 (1962). While an attempt case requires conduct imminently threatening the establishment of a monopoly, only the act of conspiracy with specific intent to monopolize is needed in a conspiracy case. *Bowen v. New York News, Inc.*, 366 F. Supp. 651, 676 (S.D.N.Y. 1973), *modified on other grounds*, 522 F.2d 1242 (2d Cir. 1975). Thus, there is no necessity to completely consider monopoly power or market power in a relevant market in a section 2 conspiracy case. The more relevant inquiry is whether or not there has been a conspiracy or combination with specific intent to monopolize a substantial part of trade or commerce. *See American Tobacco Co. v. United States*, 328 U.S. 781, 789 (1946). For a section 2 conspiracy, it is enough if "some appreciable part of interstate commerce" is involved. *United States v. Yellow Cab Co.*, 332 U.S. 218, 225 (1947).

Summarizing, in order to show a conspiracy, a plaintiff must show 1) a specific intent to monopolize; 2) the existence of a combination or conspiracy; 3) overt acts done in further-

ance of the conspiracy; and 4) an effect upon a substantial amount of interstate commerce. *See, e.g., Cullum Elec. & Mechanical v. Mechanical Contractors,* 436 F. Supp. 418 (D.S.C. 1976), *aff'd, 569 F.2d 821 (4th Cir. 1978).* The most crucial element of section 2 conspiracy [sic], as evidenced by the emphasis placed upon it by the courts, is the specific intent to monopolize. *See, e.g., Carlo C. Gelardi Corp. v. Miller Brew. Co.,* 421 F. Supp. 237, 244-45 (D. N.J. 1976) and cases cited thereat. However, even though specific intent and not monopoly power in a relevant market is the essential element, the question of whether such specific intent existed in a particular case may be substantially assisted by consideration of factors similar to those necessary in the determination of monopoly power in a relevant market. Such factors help identify monopoly and hence agreement to monopolize. For example, the likelihood of success of the conspiracy is certainly some evidence on the question of whether or not such specific intent to monopolize existed. *Hudson Val. Asbestos Corp. v. Tougher H. & P. Co., Inc.,* 510 F.2d 1140, 1144 (2d Cir. 1975).

Thus, the requisite specific intent to monopolize to prove a section 2 conspiracy claim frequently involves, to a certain extent, the concepts of monopoly with a particular product or products and a certain market. Evidence of the same may assist in providing proof of the necessary specific intent to monopolize. As stated in *Joe Westbrook, Inc. v. Chrysler Corp.,* 419 F. Supp. 824, 845 (N.D. Ga. 1976):

> . . . [T]he watchword of Section 2 is monopoly, and the basic element of the offense of monopolization is the possession of monopoly power—that is, ability to control prices in and exclude competitors from the relevant market. Although a Section 2 conspiracy may exist despite the lack of the necessary monopoly power to actually succeed in monopolizing a relevant market, the requisite intent to monopolize must be present, and that, by definition, involves a relevant market. Defendants cannot be held liable under the Sherman Act for intending to do something which is perfectly lawful. For example, if X and Y

conspire to exclude competitors from the market for ABC goods, ABC goods constituting a relevent product market, then the fact that X and Y do not have the requisite monopoly power is not a defense inasmuch as what they conspire and intend to do is unlawful. However, if X and Y conspire to exclude competitors from the market for ABC goods, and X and Y contend that ABC goods do not constitute a relevant market and in fact they do not constitute a relevant product market, then X and Y have not intended to monopolize in violation of Section 2 inasmuch as what they conspire and intend to do is not unlawful. In short, an element of conspiracy is the specific intent to monopolize; monopolization involves the exclusion of competitors from the relevant product market; the defendants are presumed to know the law, that is, that a relevant product market is an essential element of the offense of monopolization; by claiming that there is no relevant product market defendants assert that they did not have the specific intent to monopolize, a necessary element of conspiracy.

The court acknowledges that the extent to which relevant market factors should enter into the specific intent element is the subject of controversy. For example, some courts have indicated that the relevent market itself is an element of a *vertical* conspiracy under section 2, as well as of attempt to monopolize and monopolization. *American Football League v. National Football League,* 323 F.2d 124 (4th Cir. 1963); *United States v. Johns-Manville Corp.,* 231 F. Supp. 690 (E.D. Pa. 1964). Though the rule may be somewhat different in a horizontal conspiracy, *United States v. Consolidated Laundries Corp.,* 291 F.2d 563, 573 (2d Cir. 1961), this rule stems from the language in *Yellow Cab, supra.* The Tenth Circuit has explicitly adopted the "appreciable part of interstate commerce" test of *Yellow Cab. Bryan v. Stillwater Bd. of Realtors,* 578 F.2d 1319 (10th Cir. 1977); *Salco Corp. v. General Motors Corp., Buick Motor Div.,* 517 F.2d 567 (10th Cir. 1975).

The court believes that the Tenth Circuit would not require a substantial showing of relevant market in a section 2 con-

spiracy case in view of its language in *Bryan* and *Salco.* However, the court believes that the "some appreciable part of interstate commerce" test has not been met in this case with regard to the remaining defendant, Progressive. The only evidence of any concerted activity from which to show a conspiracy under section 2 is that mentioned previously in the portion of this order dealing with section 1 violations involving Progressive, Herger and/or CBS. The only "part" of commerce which could conceivably be affected by such activity is the CBS Fender line. As previously indicated, Progressive already had a "monopoly" of that line in that it was an exclusive dealer of that line under an arrangement which the court has previously found was not *per se* illegal under section 1 but should be viewed under the rule of reason. That rule of reason analysis would require a complete examination of the entire market structure.

The evidence indicates that Progressive held exclusive franchises on certain product lines and may have prevented others from obtaining business on those lines. The record does not show that this was done for the purpose of obtaining a complete monopoly in the product types. In fact, the record merely shows that although Progressive sought to be the exclusive sales and service entity for certain product lines, the market, as a whole, was still quite competitive. Plaintiffs' successful experience in selling in the market with various other lines, after changing Olsen's business, as mentioned earlier herein, indicates the high competitive nature of the market. More importantly, plaintiffs' experience in successfully entering the market shows quite clearly the absence of any likelihood of success of any effort to monopolize and weighs heavily against any finding of specific intent. *Hudson Val. Asbestos, supra,* 510 F.2d at 1144; *Carlo C. Gelardi Corp., supra,* 421 F. Supp. at 245. Accordingly, the court finds that plaintiffs have not shown that Progressive had a specific intent to monopolize any appreciable part of the market. Therefore, the section 2 claims are dismissed.

III. CONCLUSION

All of plaintiffs' section 2 claims are dismissed while plaintiffs' section 1 claims against Progressive involving Herger and/or CBS survive, though the issue of damages has not been addressed. While there currently is some evidence of damage on the section 1 claims, the extent of it and the propriety of considering certain exhibits which lend support to the damage claimed by plaintiffs appear to be disputed. A claim is made that some exhibits which have been used in argument have not been received. Also, there is other evidence with respect to damages which under the arguments made the court cannot correlate to the claims that remain. Due to the uncertainty surrounding damages, the court is unable to presently make a ruling on the motion to dismiss on this aspect of the case on the remaining claims. For these reasons, the arguments with respect to damages have not been considered dispositive on the motion at this time. The court sees no reason to grant plaintiffs' apparent motion to amend the complaint to conform to the evidence, made in Plaintiffs' Brief in Opposition to Defendants' Rule 41(b) Motion at page 41, because all the evidence has been considered in determining the validity of all of plaintiffs' claims. The motion to amend the pleadings is therefore denied. The case will be set for continuation of the trial for the presentation of any evidence that the remaining defendant may have on the section 1 claims, for proper rebuttal and final argument, including clarification of the evidentiary problems on damages.

IT IS SO ORDERED.

DATED this 22 day of May, 1980.

ALDON J. ANDERSON
United States District Judge

APPENDIX B

STATUTES AND RULES RELEVANT TO BRIEF IN OPPOSITION AND MOTION FOR DAMAGES

1. Sherman Antitrust Act §1, 15 U.S.C. §1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

2. Federal Rule of Civil Procedure 41(b):

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

3. Federal Rule of Civil Procedure 52(a):

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of this action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

4. Supreme Court Rule 17.1:

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

5. Supreme Court Rule 49.2:

When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, hereby certifies that three true and correct copies of the above and foregoing Brief of Respondent Peavey Electronics Corporation in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and Brief in Support of Motion of Respondent Peavey Electronics Corporation for Damages pursuant to Supreme Court Rule 49.2 have been forwarded by certified mail, return receipt requested, to Lowell V. Summerhays, Summerhays, Runyan and McClelland, 420 Continental Bank Building, Salt Lake City, Utah 84101; Stephen G. Crockett, Rooker, Larsen, Kimball & Parr, 185 South State Street, Suite 1300, Salt Lake City, Utah 84111; and Bryce E. Roe, Roe & Fowler, 340 East 4th South, Salt Lake City, Utah 84111; on this 15th day of July, 1983.

Original Signed by
Curtis L. Frisbie, Jr.

Curtis L. Frisbie, Jr.